IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVESTER J. SCHIEBER and VICKI A. SCHIEBER, as Co-Personal Representatives of the Estate of SHANNON SCHIEBER; SYLVESTER SCHIEBER; VICKI SCHIEBER	:	**CIVIL ACTION**
v.	:	
CITY OF PHILADELPHIA, STEVEN WOODS, individually and as a Police Officer, and RAYMOND SCHERFF, individually and as a Police Officer	:	**NO. 98-5648**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **December 13, 2000**

Plaintiffs Sylvester and Vicki Schieber, as Administrators of the Estate of Shannon Schieber, and individually as her parents, together with Sean Schieber, Shannon's brother,[1] filed an action asserting civil rights violations and state law claims against the City of Philadelphia and the individual police officers, Steven Woods ("Woods") and Raymond Scherff ("Scherff"). On July 9, 1999, the court denied defendants' motion to dismiss. Schieber v. City of Philadelphia, No. Civ. A. 98-5648, 1999 WL 482310 (E.D. Pa. July 9, 1999). On November 7, 2000, the court granted in part and denied in part defendants' motion in limine to preclude the testimony of Dr. Michael M. Baden, a forensic pathologist, that Shannon Schieber ("Schieber") was alive when

[1]Sean Schieber was dismissed as a party to this action on July 9, 1999.

Officers Scherff and Woods responded to the Emergency 911 call. Schieber v. City of Philadelphia, No. Civ. A. 98-5648, 2000 WL 1670888 (E.D. Pa. November 7, 2000).

Defendants have now moved in limine to: (1) preclude the proposed expert testimony of Gary L. French on the lost future earnings of Schieber; (2) preclude and/or limit the proposed testimony of police practices expert Walter P. Connery on the propriety of Officer Scherff's and Woods' actions, Philadelphia Police Department's ("Police Department") training for rescue calls and management control over records of rape complaints; (3) preclude and/or limit the proposed testimony of police practices expert Larry McCann on the conduct of Officers Scherff and Woods in response to the Emergency 911 call; and (4) preclude a redacted FBI Profile Report and all testimony of Supervisory Special Agent Frederick C. Kingston, member of the FBI's Critical Incident Response Group and author of the report. The motions are granted in part and denied in part.

FACTS

Plaintiffs alleged that on May 7, 1998, at 2:00 a.m., Shannon Schieber screamed for help as she was attacked in her apartment; a neighbor called the police for assistance. Compl. at ¶1. In response to the "Priority 1"[2] emergency call, Officers

[2]Emergency 911 calls are classified from 0-6 in order of priority. A "Priority 1" call is the highest classification for a civilian in need of assistance. Compl. at ¶28.

Woods and Scherff arrived at Schieber's apartment building where the neighbor stood ready to assist. Compl. at ¶2. They observed the balcony door to her apartment was closed and the apartment was dark. Compl. at ¶30. The officers knocked on Schieber's front door; receiving no answer, they made no further inquiry. Compl. at ¶2. They did not attempt to enter Schieber's apartment. Compl. at ¶2.

The officers did not call for assistance to break down the door or advice on whether to do so. Compl. at ¶33. Officer Woods admitted he would have called a supervisor had he known the call was in response to a woman screaming. Compl. at ¶34. Officer Scherff would not have forced entry unless he himself heard the screams. Compl. at ¶34. Neighbors, having been assured by the officers that Schieber was not home and told by the officers to call 911 again if they heard any other noises from the apartment, took no further action; they would have taken action otherwise. Compl. at ¶¶ 31, 35. The following afternoon, Schieber's brother and a neighbor broke into Schieber's apartment and found her dead. Compl. at ¶¶40, 69.

DISCUSSION

I. Standard of Review

In considering a motion in limine to preclude expert testimony under Rule 702 of the Federal Rules of Evidence ("FRE"), the trial judge must first determine, pursuant to Rule

104(a) of the FRE, "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592 (1993). The court then "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Id. at 589.

In making its assessment as to whether the proposed testimony of the expert is based on scientific knowledge, the following factors may be considered: (1) whether the theory or technique can be (and has been) tested, id. at 593; (2) whether the theory or technique has been subjected to peer review and publication, id.; (3) what is the known or potential rate of error and whether there are standards controlling the technique's operation, id. at 594; and (4) whether the theory or technique is generally accepted within the relevant community, id..

Additional factors that may be considered are: (1) "the existence and maintenance of standards controlling the technique's operation"; (2) "the relationship of the technique to methods which have been established to be reliable"; (3) the qualifications of the expert; and (4) "the non-judicial uses to which the method has been put." In re Paoli R.R. Yard PCB Litigation, 35 F.3d 718, 742 n.8 (3d Cir. 1994). These factors are non-exclusive and no one of the factors weighs more heavily

than another; the approach to determining the admissibility of expert testimony is a flexible one. Daubert, 509 U.S. at 594; see also Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999) (holding that a trial judge must have "considerable leeway" in determining the reliability of expert testimony); Heller v. Shaw Indus., Inc., 167 F.3d 146, 152 (3d Cir. 1999)(Daubert "made clear that its listing of the[] factors should not obscure the fact that the district court's gatekeeper role is a flexible one and that the factors are simply useful signposts, not dispositive hurdles that a party must overcome in order to have expert testimony admitted."); In re Paoli, 35 F.3d at 742 ("a district court should take into account all of the factors listed by Daubert . . . as well as any others that are relevant.").

Determining the reliability of the proffered expert testimony demands a lower standard than the "merits standard of correctness." In re Paoli, 35 F.3d at 744. "[A] judge should find an expert opinion reliable under Rule 702 if it is based on 'good grounds,' i.e., if it is based on the methods and procedures of science . . . .[This standard may be met] even though the judge thinks the opinion to be incorrect." Id.; see also Heller, 167 F.3d at 152-53 (same). "[A] district court must, [nevertheless], examine the expert's conclusions in order to determine whether they could reliably follow from the facts known to the expert and the methodology used." Id. at 153. If

there are good grounds, "[t]he analysis of the [expert's] conclusions themselves is for the trier of fact when the expert is subject to cross-examination." Kannankeril v. Terminix Internat'l, Inc., 128 F.3d 802, 807 (3d Cir. 1997).

This analysis will be done by the jury if it is first determined that the testimony – now deemed reliable – will assist the trier of fact; in other words, that there is a "valid scientific connection to the pertinent inquiry." Daubert, 509 U.S. at 592; see also In re Paoli, 35 F.3d at 743 (same). This connection has been described as a "fit" between the testimony offered and the facts of the case. Daubert, 509 U.S. at 591.

Since the testimonial evidence sought to be precluded here is non-scientific in nature, the factors laid out in Daubert and In re Paoli provide insufficient guidance for the court to perform its gatekeeping function. In some cases, "the relevant reliability concerns may focus upon personal knowledge or experience. * * *[T]here are many different kinds of experts, and different kinds of expertise." Kumho, 526 U.S. at 149. The experts here relied on their professional experience, training and skills to reach their conclusions and the court tested the reliability of their opinions based on an examination of each expert's professional background and experience, training and the methods used, and the non-judicial uses of opinions derived from these methods; and the Daubert and In re Paoli factors were used

as applicable. See id. at 150(noting that Daubert held that "the gatekeeping inquiry must be 'tied to the facts' of a particular 'case.'").

II Dr. Gary L. French

Dr. Gary L. French ("French") was retained by plaintiffs to provide an expert opinion regarding Schieber's lost future earnings. He prepared a report containing two alternate future employment scenarios ("French Report"). The first scenario assumes that Schieber would graduate from The Wharton School ("Wharton"), with a M.B.A. degree in 2002, obtain a tenure-track faculty position at an upper-echelon business school and also engage in some consulting work after attaining tenure in her sixth year. In the second scenario, French assumed that Schieber would have entered the private sector at an investment bank, insurance company or other financial entity after graduation from Wharton in 2002. Based upon these two scenarios, French concluded that Schieber's death resulted in an economic loss between $4,100,000 and $8,200,000, with federal and state income taxes deducted and earnings discounted to present value by applying work-life tables.[3]

Defendants contest French's expertise, the methods used by French in reaching his conclusions, and the underlying

[3]The range of damages using the "LPE technique" is $4,100,000 to $8,300,000 after deducting federal and state income taxes and discounting to present value. See infra at 9-10.

assumptions for the second scenario.

a. French's Expertise

French is a senior vice president at Nathan Associates, Inc., an economics consulting firm, where he has been employed in various positions since 1979. He has a B.B.A., M.A., and Ph.D. in economics, all from the University of Houston. He taught Finance and Economics at three universities before becoming a consultant in 1977. He has published seven articles in legal and economics journals and is a member of the American Economic Association, Industrial Organization Society, and National Association for Business Economics.

Defendants argue that French lacks expertise in the field of vocational profiling. The court, in its gatekeeping function, needs to determine whether French is qualified to render an opinion as a mathematical expert, not whether he is qualified to divine Schieber's professional opportunities had she lived. Whether there is adequate evidence to support either or both of his two scenarios is another question not bearing on French's expertise to testify to mathematical calculations. French's educational and professional background qualify him to testify to Schieber's lost future earnings.

b. French's Method

French uses the "LPE technique" for calculating work-life

expectancy.[4] In the amendment to his calculations, he also uses the government's work-life tables.[5] Both these methods are commonly used[6] and often will provide the same numbers. November 6, 2000 Hearing Transcript ("Tr.") at 181. Defendants criticized French for making his calculations on the assumption that Schieber would work through age eighty-one. Using the LPE approach, the probability that she would be participating in the work force at that age is accounted for in the "P" factor; this criticism is for jury consideration.

Defendants criticized French for his failure to take

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[4]The "L" stands for life, "P," for the probability that if the subject is living she will either be working or actively looking for work, and "E" stands for employment. Tr. at 178-79. "The LPE factor is a factor that is the combined probability that all three things exist." Tr. at 179. In other words, "the product of the three distinct probabilities at each age – the joint probability LPE – is the chance that an average person would actually have been alive, trying to find a job, and in fact, employed." MICHAEL L. BROOKSHIRE & STAN V.SMITH, ECONOMIC/HEDONIC DAMAGES: THE PRACTICE BOOK FOR PLAINTIFF AND DEFENSE ATTORNEYS 48 (1990). This technique provides for sex differentials in labor force participation by taking into account child bearing and rearing. Tr. at 180. It was developed in response to "the flaws of traditional work-life tables." BROOKSHIRE & SMITH at 47.

[5]These tables are issued by the Bureau of Labor Statistics of the Department of Labor. BROOKSHIRE & SMITH, supra note 4, at 47. They allow for entry and exit from the labor force during a lifetime and breaks down work-life expectancy "by such relevant variables as race, sex, and whether the person was active (participating) or inactive in the work force at the time of injury or death." Id.

[6]French estimates that half his colleagues use the LPE approach and the other half use the work-life tables. Tr. at 182.

inflation and interest rates into consideration. French addressed these concerns at the November 6, 2000 hearing and in his revised calculations. French discounted Schieber's future earnings after deductions for federal and state taxes[7] with a discount rate equal to the thirty-year Treasury bond rate[8] over her lifetime. Tr. at 186-87.

Also at issue was French's method for calculating fringe benefits and deductions for personal consumption. In making the fringe benefit calculation, French used data from the Bureau of Labor Statistics as well as a basic fringe benefit package, including health insurance, life insurance, Social Security and some sort of retirement savings plan. Tr. at 189. Based on this information, French determined that on average, fringe benefits equal 25% of salaries or wages. Tr. at 190. This 25% is not a static percentage, but is a starting dollar amount increasing annually by 3.1% and becoming less than 25% of her annual salary as her annual salary continued to rise over time. Pl.'s Memo at 9.

Since Schieber would have spent much of her income on herself, French went to a government database for consumption

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[7]French used average tax rates based on IRS data for the federal tax reductions and for the state tax reductions, he used the average of the highest state income tax rates. Tr. at 186.

[8]This bond rate was 5.73% – the most current one available at the time of the November 6, 2000 hearing.

expenditures of single people in the highest income bracket.[9] Tr. at 190. According to that database, Schieber's consumption expenditures would be fifty-seven percent of her income. Tr. at 190. He deducted that percentage from projected income, id.; this number was also increased by 3.1% per year to account for the productivity factor. Id. This method of calculating damages is mentioned in two treatises concerning the calculation of economic damages.[10] Tr. at 191.

In scenario one, French opined that

> [f]aculty members at the best and most prestigious business colleges are typically former graduate students from such schools as well. Thus, given that Wharton is ranked second among all American collegiate schools of business, the 75th percentile salary among new hires in finance, insurance and real estate (FIR) was identified as the likely and appropriate amount that Ms. Schieber would have earned from an academic career.

The French Report at 12.

French further based his placement of Schieber within the 75th percentile salary range on his conclusion that she was above average. Tr. at 192. This conclusion is based, in part, on her achievement at Duke (she graduated with a triple major and a 3.6

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[9]The highest category for single people in the government data is income over $70,000; the average income of people in that category was $133,000 in 1998. Tr. at 190.

[10]BROOKSHIRE & SMITH, supra note 4 and GERALD D. MARTIN & TED VAVOULIS, DETERMINING ECONOMIC DAMAGES (2000).

grade point average), her high SAT[11] and GRE scores, and her admission to Wharton, a highly-rated graduate school. Tr. at 192. French also looked at the salaries at the 75th percentile of private accredited universities, where he assumed she would teach. Tr. at 193.

However, French found no publicly available information regarding consulting income, Tr. at 195, so he decided to interview people he and Shannon Schieber's father believed would have knowledge of customary consulting income.[12] Tr. at 196. He assumed Schieber would start to earn supplemental income in her sixth year of teaching, when she would have been a tenured associate professor. His calculations of her earnings after her sixth year in academia are based on this anecdotal investigation. Id.

French excuses his lack of reliance on objective material for his calculations by the non-existence of publicly-available information. However, polling individuals recommended Schieber's father is neither a scientific nor a reliable method. Schieber's father is a plaintiff seeking a damage award based in part on the

[11]Schieber's score on the SAT was within the 98th percentile when she was only in seventh grade. The French Report at 4.

[12]The interviewees were asked: "What is your understanding that people in finance or insurance at top tier universities would make?" French took the midpoint of each interviewee's response, averaged each of these and used that as his base figure. Tr. at 196.

information from this survey, he is clearly biased. Information from a survey of persons selected by him is non-scientific and tainted. The calculations as to consulting income are inadmissible as unreliable.

With regard to the second scenario, French placed Schieber in the 75th percentile of private sector compensation. The French Report at 17; Tr. at 197. His figures came from the same set of selected interviewees as in the first scenario[13] and the 1999 Investment Compensation Survey ("Survey").[14] The French Report at 16; Tr. at 197-98. The median numbers in the Survey were below the numbers French received from other sources;[15] the Survey 90th percentile numbers were more consistent with his other sources. Tr. at 199. French took the average of the median and the Survey 90th percentile for calculating the base starting salary, and salary after five and ten years. Id. The method of polling individuals known to Schieber's father is unscientific and unreliable. To the extent French's numbers are based on the 1999 Investment Compensation Survey, his testimony

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[13]He asked the interviewees: "What are starting salaries for academicians and what are starting salaries and later salaries for people in the private sector with Wharton type finance Ph.D.s or insurance Ph.D.s.?" Tr. at 198.

[14]This survey is produced by the Association of Investment Management. Tr. at 197.

[15]The Survey includes people with only bachelor's and master's degrees, in addition to Ph.D.s. Tr. at 199.

is admissible, but French may not rely on anecdotal poll results to increase or alter his figures.

French's methods for calculating damages, if modified to exclude information from selected interviewees,[16] are reliable and will assist a jury in determining an appropriate award of damages for future lost wages. The methods (if anecdotal surveys of persons selected by plaintiff are excluded) have been published in treatises and rely in part on tables and statistics issued by the federal government; they also are generally accepted within the relevant community. French's training and experience render his application of them reliable and helpful.

c. Fit

In addition to the reliability and helpfulness factors, "an 'expert's testimony [regarding future earnings loss] must be accompanied by a sufficient factual foundation before it can be submitted to a jury.'" Elcock v. Kmart Corp., 228 F.3d 448, 467 (3d Cir. 2000)(quoting Gumbs v. International Harvester, Inc., 718 F.2d 88, 98 (3d Cir. 1983)). The testimony must "fit" the facts. Defendants argue there is an insufficient factual foundation for the second scenario. Although they do not contest the validity of the foundation for the first scenario, the court will also review it as is its duty under Daubert, Kumho, and

[16]To the extent that French's numbers are based on anecdotal evidence they are unreliable and inadmissible.

Elcock.

In devising two alternative career path scenarios, French reviewed Schieber's background, her academic record, her work experience, testimony of her parents, brother and friends, and various government statistics. Tr. at 173-74; French Report, Appendix B. In support of a career in academia and consulting, French relied on the deposition testimony of Schieber's brother, her mother, her friend, Martin Halek, Schieber's status as a Heubner Foundation Fellow,[17] Schieber's application to the Heubner Foundation fellowship,[18] the personal statement from her Wharton application,[19] and a letter Schieber wrote to two former Duke professors.[20] French's assumption that Schieber would also

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[17]As a recipient of the S.S. Heubner Foundation fellowship award, Schieber signed an acceptance letter certifying, among other things, that it was her intention to pursue a career in college teaching. Memorandum of Law in Support of Defendants' Motion In Limine to Preclude the Proposed Testimony of Gary L. French ("Def.'s French Motion"), Ex. J.

[18]In this application, Schieber wrote: "I can assure you with full confidence that, should I be selected for this Fellowship, I will pursue a career in both research and teaching with a specialization in risk and insurance." Def.'s French Motion, Ex. I at 4.

[19]Schieber stated: "Professionally, I would love for my return to academia this August or September to be a permanent one." Def.'s French Motion, Ex. G at 2.

[20]Schieber informed her former professors, Drs. Hodel, that she wanted to pursue teaching as her profession; she wrote: ". . . it is from my positions as a volunteer teacher in two high schools in New York that I have gained the most pleasure and insight into that which I wish to do with the rest of my life – **I want to teach!!**" Def.'s French Motion, Ex. D at 1 (emphasis in

undertake some consulting work, in addition to her faculty position, is based on his personal experience that economists and professors do such additional work.[21] There is a "fit" between these facts and the first scenario.

In support of a career in the private sector, French relied on the testimony of Dr. Babbel, a Wharton professor of finance and insurance,[22] and Schieber's parents,[23] and his personal experience that professionals do not necessarily remain in just one career.[24] Tr. at 176-77. Defendants' real dispute with assuming a career in the private sector is the lack of a factual basis for it. The evidence relied upon by French favors the probability that Schieber would have pursued a career in academia

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the original).

[21]There are eighteen academicians regularly associated with his firm who are not employees. Tr. at 194-95.

[22]Dr. David Babbel testified that "nearly half of Wharton's Ph.D. graduates in finance-related fields go to 'Wall Street' type jobs, while the other half accepts positions in academe." The French Report at 7; Tr. at 176-77.

[23]The Schiebers "testified to a strong belief that [Schieber] would spend most of her career in the private sector in one capacity or circumstance or another. * * * . . .[S]he enjoyed teaching and might have wanted to maintain a foot in academia or straddle the fence between academia and the private sector." The French Report at 7 (citing the depositions of Vicki Schieber, April 18, 2000, at 30-34 and Sylvester Schieber, April 18, 2000, at 94-106).

[24]Both of Schieber's parents started their careers as academicians, but have been in the private sector for most of their professional lives. Tr. at 177-78.

rather than in the private sector. Dr. Babbel's testimony regarding what Wharton graduate students generally do is a broad statement, not accounting for Schieber's expressed preference for a teaching career. Schieber's parents' belief she would have spent a good deal of her career in the private sector is unconvincing in light of Schieber's own expressed desire to pursue academic life; their testimony is speculative, if not wishful thinking, that she would emulate their choices.

French's personal observation that people generally work in both the public and private sectors over the course of their careers is not reliable evidence helpful to a trier of fact; it does not apply specifically to Schieber and does not conform to any facts before the court. It will not be considered.

It is true that at age 23, when Schieber was tragically murdered, not many people can state with certainty what they wish to do professionally for the rest of their lives, but what Schieber herself said about her career goals is the best evidence of the path her career would have taken and is the one that should be used for calculating future lost earnings.

"The test of admissibility is not whether a particular [expert] opinion has the best foundation or whether it is demonstrably correct. Rather, the test is whether 'the particular opinion is based on valid reasoning and reliable methodology.'" Oddi v. Ford Motor Co., No. 99-3406, 2000 WL

1517673, at *6 (3d Cir. Oct. 13, 2000). However, "'a court may conclude that there is simply too great a gap between the data and the opinion offered.'" Id. The court finds such a gap here. French will not be permitted to testify at trial to figures based on the private sector career path.

III Walter P. Connery

Walter P. Connery ("Connery") prepared an expert report for the plaintiffs analyzing deficiencies of Officer Scherff's and Woods' actions, Police Department lack of training for response to rescue calls and the inadequacy of management control over rape complaints ("Connery Report"). Defendants argue that Connery's testimony is barred by Federal Rules of Evidence ("FRE") 702[25] and 704.[26]

a. Connery's Expertise

Connery has thirty-eight years' experience in law enforcement; before his retirement, he worked for the United States Department of Justice ("DOJ"), Immigration and

[25]Rule 702 of the FRE provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702.

[26]Rule 704(a) of the FRE provides, in relevant part: "[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a).

Naturalization Service as the Director of the Office of Professional Responsibility and Assistant Director of Investigations. At the DOJ, Connery trained supervisors and agents to conduct collateral administrative investigations. He also trained managers, supervisors and employees in ethics and integrity maintenance. Prior to his positions at the DOJ, Connery spent twenty-three years with the New York City Police Department ("NYPD") as foot patrolman, patrol supervisor, and Deputy Inspector in the Prosecutor's Department, where he directed all internal administrative trials for the entire NYPD. As an aide to the Commissioner, he audited questionable arrests and revised police training. As an assistant director of police training, he designed the NYPD Police Student's Law Guide on probable cause, and the First, Fourth, Fifth and Sixth Amendments. In addition to a college degree, Connery has a law degree from St. John's University. He has taught at John Jay College of Criminal Justice and has published several articles. Connery is qualified to testify as an expert on police practices.

b. Connery's Method

Connery reaches his conclusions by applying his significant experience, training and skills to the facts provided to him. In formulating his opinions and making his report, Connery reviewed numerous materials, including the deposition transcripts of Scherff and Woods, Commissioner Timoney, other members of the

Police Department, and Schieber's neighbors. Connery Report at 1.[27] While not a formal, testable method, it is the one used by police practices experts and accepted by the courts.[28] In light of Connery's considerable experience, his opinions are reliable.[29]

c. Fit

In support of his opinion that Officers Scherff and Woods had a duty to enter Schieber's apartment, Connery relied on the following facts: (1) they had received a Priority 1 Emergency 911 call of a woman screaming, Tr. at 70; (2) the neighbor who made the 911 call was on the scene and spoke with the officers, Connery Report at 7-8; Tr. at 71; and (3) the officers had no other calls pending, Connery Report at 17. Based upon the fact

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[27]Defendants' police practices expert, Ronald H. Traenkle, testified that aside from Connery's ultimate conclusions and the fact that he did not review the deposition testimony of one of Schieber's neighbors, Traenkle had no disagreements with the manner in which Connery wrote his report or the methodology he used. Traenkle Depo. at 110-111, 113.

[28]See United States v. Hankey, 203 F.3d 1160, 1169-70 (9th Cir. 2000) cert. denied, 120 S. Ct. 2733 (2000)(accepting a police gang expert's testimony whose opinions were based on his "street intelligence" about gang behavior when the expert demonstrated "that the information upon which he relied is of the type normally obtained in his day-to-day police activity."). See also United States v. Alatorre, 222 F.3d 1098, 1104 (9th Cir. 2000)(accepting the expert testimony of a customs service special agent on narcotics smuggling and sale based on his twelve years' experience as a special agent, specialized training and extensive knowledge as a result of his work as a case agent and in other related capacities).

[29]See Kumho, 526 U.S. at 149 ("the relevant reliability concerns may focus upon personal knowledge or experience.").

that there was a complainant on the scene who was certain[30] that he heard Schieber screaming inside her apartment, Connery opined that police chiefs would unanimously agree that exigent circumstances required officers to force open the door to Schieber's apartment. Tr. at 71.

Connery reviewed case law on exigent circumstances in determining whether an officer has authority, under the Fourth Amendment, to make a warrantless entry into a home for rescue purposes and applied a standard of reasonable belief.[31] Tr. at 82. It is upon this understanding of the Fourth Amendment that Connery bases his opinion that police chiefs would all agree the

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[30]There is a factual dispute whether Schieber's neighbor equivocated about where the screams came from and whether any lack of certainty was induced by suggestive police questioning. Connery's opinion is based upon his assumption that the neighbor was clear about the location of the screams. Tr. at 76.

[31]"[T]he Fourth Amendment does not bar police officers from making warrantless entries . . . when they reasonably believe that a person within is in need of immediate aid. * * * 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" Mincey v. Arizona, 437 U.S. 385, 392 (1978)(internal citation omitted); U.S. v. Richardson, 208 F.3d 626, 629 (7th Cir. 2000), cert. denied, 121 S.Ct. 259 (2000)(same). "'The right of the police to enter and investigate in an emergency . . . is inherent in the very nature of their duties as peace officers . . . .'" Good v. Dauphin, 891 F.2d 1087, 1093 (3d Cir. 1989)(quoting United States v. Barone, 330 F.2d 543, 545 (2d Cir. 1964), cert. denied, 377 U.S. 1004 (1964)). "[T]he state actors making the search must have reason to believe that life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate the threat." Id. at 1094.

officers should have forced Schieber's door.[32] Connery has sufficient expertise, experience and knowledge to testify and the facts of the case, if proven in accordance with his assumptions, "fit" his opinion.[33]

Connery's opinion that the City's failure to train caused a violation of Schieber's constitutional rights reaches a legal conclusion to which he may not testify. See Whitmill v. City of Philadelphia, 29 F. Supp.2d 241, 246 (E.D. Pa. 1998)("'As a general rule an expert's testimony on issues of law is inadmissible.'")(quoting United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991)). See also Nieves-Villaneuva v. Soto-Rivera, 133 F.3d 92, 100 (1st Cir. 1997)("Fed.R.Evid. 704(a) . . . does not vitiate the rule against expert opinion on questions of law."); Berry v. City of Detroit, 25 F.3d 1342, 1353 (6th Cir. 1994), cert. denied, 513 U.S. 1111 (1995)("When the rules speak of an expert's testimony embracing the ultimate issue, the reference must be to stating opinions that suggest the answer to

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[32]"911 calls reporting an emergency can be enough to support warrantless searches under the exigent circumstances exception, particularly where . . . the caller identified himself." Richardson, 208 F.3d at 630.

[33]The seven other Daubert and In re Paoli factors are inapplicable to the evaluation of the admissibility of Connery's testimony on this issue. The court is satisfied that Connery is qualified to present this opinion and that it will be helpful to the jury in determining the liability of Scherff and Woods. The underlying factual basis for Connery's opinion can be challenged on cross-examination at trial and defendants may present their own expert to rebut Connery's testimony.

the ultimate issue or that give the jury all the information from which it can draw inferences as to the ultimate issue. * * * It is the responsibility of the court, not testifying witnesses, to define legal terms.").

Connery may state his opinion that the City failed adequately to train its officers regarding home entry under exigent circumstances for the purpose of rescue. His opinion that the City failed adequately to train is based on his review of the Police Department's training materials. Tr. at 87-88. He testified that his review revealed the materials contained twenty-nine[34] small print pages on exigent circumstances, all dealing with criminal cases, except for one[35] "recogniz[ing] 'the right of the police to respond to emergency situations and to make warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.'" Connery Report at 22; Tr. at 88. Additionally, Connery reviewed the Police Department's Academy Recruit questions and found only one superficially addressing this matter. Connery Report at 23-24. Also of import was the City's failure to use role playing when Scherff and Woods were trained to teach the proper response to exigent circumstances. Tr. at 90; Connery Report at 24.

Connery compares the Philadelphia Police Department's

[34]In his report, Connery notes that the materials contain 19 pages on exigent circumstances. Connery Report at 22.

[35]Mincey v. Arizona, 437 U.S. 385 (1978).

approach to the doctrine of exigent circumstances with that of the Indianapolis Police Department. The Indianapolis training materials state that officers may enter private dwellings "to protect the health, safety and/or wellbeing of a person" and that exigent circumstances include "factual situations in which the officer forcing entry to a dwelling has probable cause[36] to believe immediate entry is necessary to . . . prevent injury to a person in the dwelling." Tr. 94-95. Connery believes that the City approach is inferior to that of Indianapolis; the City fails to clarify the distinction between entry to make an arrest and to effectuate a rescue. Tr. at 104. Connery also cites the Los Angeles Police Department favorably for training "generally on the concept that the primary mission [of police officers] is preservation of life." Tr. at 109.

Connery's experience training officers, designing the NYPD Police Student's Law Guide, as well as his other experience during thirty-eight years in law enforcement qualify him to testify to the adequacy of the Police Department's training on warrantless entry into a home in exigent circumstances; his

[36]Connery acknowledges that Indianapolis uses the "probable cause" standard rather than the "reasonable belief" standard set by the Supreme Court in Mincey and followed by the Third Circuit. See Good, 891 F.2d at 1093, 1094. Tr. at 123-24. He concedes that it is a "rather serious mistake," but argues that the Indianapolis materials give a better explanation of the exigent circumstances exception to its officers than do the materials provided to Philadelphia police officers. Tr. at 124.

opinion will assist the jury.[37]

Finally, the Connery Report states an opinion that the previous management of the Police Department allowed and tolerated practices promoting the systemic practice of downgrading rapes and that this had an effect on police officers handling rescue calls. Connery Report at 37-38. As a basis for this opinion, Connery cited the first (attempted) rape committed by the Center City Rapist; it was downgraded to "investigation of person."[38] Tr. at 112. The second assault was likewise downgraded.[39] Tr. at 113. Downgrading prevented emergence of a pattern alerting the police to the modus operandi of the Center

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[37]Defendants argue that Connery's opinions "will not assist the trier of fact" for a number of reasons, including his inability to state how many hours the Police Department should devote to this training or how role-playing scenarios should be incorporated into such training. Memorandum of Law in Support of Defendants' Motion In Limine to Preclude and/or Limit the Testimony of Plaintiffs' Expert, Walter Connery ("Def.'s Connery Motion") at 6. It is not required that Connery be able to do so. Defendants may cross-examine him on this, but lack of such recommendations does not invalidate the reliability or helpfulness of his opinion.

Defendants likewise argue that Connery failed to undertake any study of similar incidents to show the Police Department was on notice of the need for additional or alternative training. Def.'s Connery Motion at 6. Connery's analysis of the materials and training provided to recruits in Scherff's and Woods' Academy class is a sufficient basis for his opinion; his knowledge, background and experience provide him with an adequate context within which to evaluate these materials and render an admissible expert opinion.

[38]This assault was later upgraded. Tr. at 113.

[39]This assault was likewise later upgraded. Tr. at 113.

City Rapist[40] and affected police response. Id. Connery has the expertise effectively to help the jury on this issue.

Connery may testify at trial regarding the three opinions contained in his report but he may not testify to his legal conclusion that the inadequacy of the Police Department's training violated Schieber's constitutional rights; he may not testify as to what the Fourth Amendment standards are but only to the standards he used in formulating his opinion. The court will instruct the jury on the relevant law.

IV Larry McCann

Larry McCann ("McCann") is a police practices expert retained by plaintiffs to prepare an expert report regarding the conduct of Officers Scherff and Woods in their response to the Priority 1 Emergency 911 call at Schieber's apartment ("McCann Report"). Defendants argue that FRE 702 and 704(a) preclude much of his testimony. They do not challenge McCann's qualifications as an expert or his method in reaching his conclusions; they do challenge several of his opinions as expressions of legal conclusions prohibited by FRE 704(a) and assert they are precluded by FRE 702 as not helpful to a trier of fact.

At the November 6, 2000 hearing, the parties agreed that McCann would only testify that Officers Scherff and Woods

[40]The first four assaults committed by the Center City Rapist occurred within a rectangular area, approximately 1200 by 2000 feet and the assailant had the same modus operandi. Tr. at 115.

responded to the 911 Emergency call to Schieber's apartment in an unprofessional, deliberately indifferent and shocking manner and that they should have forced her door; he will not be offered to testify to any legal conclusions. Tr. at 152-53. They also agreed that the court's decision with regard to Connery will also apply to McCann. Tr. at 152. The court will nevertheless consider whether McCann qualifies as an expert and whether his methodology and technique are reliable.

a. McCann's Expertise

Larry McCann is a member of The Academy Group, Inc.,[41] and has consulted in over two thousand homicides with numerous agencies including the Federal Bureau of Investigations ("FBI"), the Maryland State Police, the Florida Department of Law Enforcement, and the Texas Rangers. Prior to consulting, McCann spent eleven years with the Virginia State Police, first as Special Agent and then as Senior Special Agent for the Bureau of Criminal Investigation. Before that, he was a state trooper for the Virginia State Police and a patrolman for the Arlington County Police. He has spent almost thirty years in law enforcement in one capacity or another.

McCann has a bachelor's degree in psychology from

[41]The Academy Group, Inc. consists of retired FBI, Secret Service, and Virginia State Police special agents, all psychological profilers for their respective agencies, who have formed a group offering criminal investigative and behavioral analysis in the public sector. Tr. at 155.

Bridgewater College and has also engaged in specialized studies in administration of justice and forensic science, and various courses given by the FBI Academy. He is a certified general instructor for the Virginia Department of Criminal Justice Services and the Virginia Forensic Science Academy; he has taught a course on interviews and interrogations at the Virginia State Police Academy. He is a member of six professional organizations and has received numerous awards from various organizations including the FBI Violent Criminal Apprehension Program, Virginia Homicide Investigators Association, and Florida Department of Law Enforcement. McCann qualifies as an expert.

b. McCann's Method

As a preliminary matter, plaintiffs attempted to bolster the reliability of McCann's report by eliciting testimony that his report was reviewed and approved by Dr. Roger Depew, the founder of The Academy Group, Inc., McCann's employer. Tr. at 154. Review by an employer, in particular review without the advantage of having the original documents relied on in drafting the report,[42] does not constitute peer review in the Daubert context. Peer review in this context refers to a study, opinion, or article being published and widely circulated within the relevant community; peer review is not applicable to an expert report prepared for the sole purpose of litigation.

[42]Dr. Depew was not provided with any material other than the report itself. Tr. at 158.

McCann's opinion that Officers Scherff and Woods wasted time and misused their authority by dissuading Greeley[43] (through improper questioning techniques) of his certainty about the origin of the screams, McCann Report at 6, is supported by the treatise, Criminal Interrogation and Confessions, by Reid and Inbau, Tr. at 156; the interrogation of Greeley by Scherff and Woods at the scene failed to comply with its teachings, Tr. at 157. McCann may testify in conformity with this opinion and the standards he used in formulating it.

Like Connery, McCann's method is to apply his skill, experience and training (and to a limited degree, the teaching of a treatise) to the facts. His review of the materials provided to him is his sole method but it is sufficiently reliable based upon a finding that he is qualified to testify as an expert on police practices.

c. Fit

There is a fit between McCann's opinion and the facts of the case; his opinion will aid the jury. He may testify to his opinion that Officers Scherff and Woods improperly questioned Greeley and that they should have forced Schieber's door; he may not testify to legal conclusions.

V Redacted FBI Profile Report and SSA Frederick C. Kingston

Supervisory Special Agent Frederick C. Kingston

[43]Mr. Greeley is Schieber's neighbor who placed the 911 call and who met the officers when they arrived on the scene.

("Kingston"), and other members of the FBI's Critical Incident Response Group, prepared a criminal investigative analysis for the Police Department regarding the Center City Rapist ("FBI Report"). Defendants moved to have both Kingston's deposition testimony and the FBI Report excluded from trial on three grounds: (1) the FBI Report is inadmissible pursuant to FRE 602[44] and 701[45] because Kingston is a lay witness and his opinions contained in the report are not based on personal knowledge; (2) the FBI Report is unfairly prejudicial and speculative and therefore inadmissible pursuant to FRE 403;[46] and (3) even if the FBI Report is admissible, Kingston's live testimony should be required in lieu of the admission of his deposition.

a. FRE 602 and 701

Defendants claim Kingston is a lay witness not present at the murder; neither did he investigate the crime scene so he has

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[44]FRE 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602.

[45]FRE 701 provides: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed. R. Evid. 701.

[46]FRE 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." Fed. R. Evid. 403.

no first-hand knowledge of the crime.[47] FRE 701, the rule of evidence pertaining to lay witness testimony, has been interpreted "to permit individuals not qualified as experts, but possessing experience or specialized knowledge about particular things, to testify about technical matters that might have been thought to lie within the exclusive province of experts." Asplundh Mfg. Div., A Division of Asplundh Tree Expert Co. v. Benton Harbor Eng'g, 57 F.3d 1190, 1193 (3d Cir. 1995). Kingston indisputably possesses experience and specialized knowledge about criminal profiling. However Rule 602's requirement that a witness have personal knowledge of the matter to which he or she wishes to testify is incorporated into FRE 701.

Plaintiffs argue that Kingston's knowledge does fall within the Third Circuit's requirement of "personal knowledge."

> "The law requires that he who deposes to a fact should have the means of knowing it." [W]hat the witness represents as his knowledge must be an impression derived from his own senses. And this impression must be gauged by the geographic proximity of the witness to the event, the length of time involved, and the existence of proper conditions for the exercise of powers of observation and perception.

Joy Mfg. Co. v. Sola Basic Indus., Inc., 697 F.2d 104, 111 (3d Cir. 1982)(internal citation omitted). Plaintiffs argue that Kingston had "immediate and personal access to the crime scene,

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[47]The report states that the analysis contained therein "is based solely on a review of case materials submitted by [the Philadelphia Police Department], as well as information obtained during a case consultation held on 07/29/1999. . . ." FBI Report at 1.

investigator statements, autopsy photographs, detailed analysis from the Philadelphia Police Department, and all of the other information contained in the VICAP Report . . . ." Plaintiffs' Opposition to Defendants' Motion In Limine to Preclude the Redacted FBI Profile Report and All Testimony, Either Live or Through Deposition, of Frederick C. Kingston at Trial ("Pl.'s Opp. to Kingston Motion") at 4. They argue, "Kingston was able to exercise his powers of observation and perception pertaining to Ms. Schieber's murder, sufficient to demonstrate personal knowledge." Id. Alternatively, plaintiffs argue that the court "may take judicial notice that a law enforcement officer has personal knowledge of events of which he becomes aware."[48] Id.

Ultimately, whether Kingston had personal knowledge is irrelevant because his opinion does not meet the second prong of FRE 701; his opinion would not be helpful to the determination of a fact in issue. The FBI Report begins with a disclaimer noting its speculative nature and states that it is provided exclusively for the Police Department's investigative use. FBI Report at 1. This sort of speculative information intended for use solely in

[48]In support of this contention, plaintiffs cite United States v. Lake, 150 F.3d 269, 273 (3d Cir. 1998), in which it was held that a police officer who was a life-long resident of the Virgin Islands "ha[d] a sufficient basis to testify as to whether any motor vehicle manufacturing facilities are located there." The police officer's testimony in Lake, based on his personal observations, is clearly distinguishable from the proffered testimony of Kingston here; Lake is inapposite.

conjunction with an on-going police investigation, not based on first-hand observation or other perception of the crime, falls outside of the scope of Rule 701. For the same reasons that the report should be deemed inadmissible on this ground, so should the testimony of Kingston himself; his testimony would be based on knowledge gleaned from Police Department materials and his opinions would be speculative at best and unhelpful in determining time of death or any other material fact in issue.

FRE 403

Defendants' argument that the FBI Report and Kingston's testimony are prejudicial, speculative and therefore inadmissible under FRE 403 is also dependent on the Report's disclaimer, stating, "[t]he information is based upon probabilities" and was "provided exclusively for the Philadelphia (PA) Police Department's investigative assistance." FBI Report at 1. Plaintiffs argue that the Report and Kingston's testimony are "highly probative not only of the circumstances and time of Ms. Schieber's death, but also of the Schieber's Monell and state-related danger claims." Pl.'s Opp. to Kingston Motion at 10.

The FBI Report documents what may have happened the night of Schieber's murder to speculate on the nature of the murderer from possible scenarios. There is nothing definitive about the Report, and with the perpetrator still at large, exactly what occurred in Schieber's apartment that night is still unknown.

The Report was not prepared to estimate the time of death nor to evaluate police misconduct. It was prepared to aid the police in investigating a crime and capturing the perpetrator. Its proffered use outside the context for which it was prepared will likely cause a jury unnecessary confusion and misapprehension of what is factual and what is speculative; the FBI Report and Kingston's testimony will be excluded on this ground.

Kingston's Deposition Testimony

Since DOJ employees need DOJ permission to testify about material contained in DOJ files,[49] and the DOJ has not granted permission to Kingston to testify,[50] plaintiffs seek to admit designated portions of his deposition at trial in accordance with FRE 804(a)(5)[51] and (b)(1).[52] Defendants argue that if Kingston's

[49]28 C.F.R. §16.22(a).

[50]"[P]ursuant to 28 C.F.R. §16.21-29, the Department of Justice has advised the Schiebers and the Court that the federal government has not consented to permit Special Supervisory Agent Kingston to testify at trial." Pl.'a Opp. to Kingston Motion at 11.

[51]FRE 804(a)(5) provides in relevant part: "'Unavailability as a witness' includes situations in which the declarant is absent from the hearing and the proponent of a statement is unable to procure the declarant's attendance . . . by process or by other reasonable means." Fed. R. Evid. 804(a)(5).

[52]FRE 804(b)(1) provides that "[t]estimony given as a witness . . . in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and

deposition testimony is deemed admissible at trial, the entire transcript, not just plaintiff-designated portions, should be admitted.

Because the court has already decided that neither the FBI Report nor Kingston's live testimony is admissible, Kingston's deposition testimony is inadmissible for the same reasons.

Conclusion

Defendants' in limine motion to preclude and/or limit the testimony of Dr. Gary L. French, will be granted in part and denied in part. Dr. French may testify with respect to Schieber's future career in academia and consulting, without reliance on personal interviews with Schieber friends. He may not testify with regard to Schieber's future career in the private sector. Defendants' motion in limine to preclude and/or limit the testimony of Walter P. Connery will be denied except to the extent that Connery may not testify to legal conclusions or to what Fourth Amendment standards are. Defendants' motion in limine to preclude and/or limit the testimony of Larry McCann will be denied except to the extent that he may not testify to legal conclusions. Defendants' motion in limine to preclude admission of the redacted FBI Profile Report and all testimony of

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similar motive to develop the testimony by direct, cross, or redirect examination" is not hearsay "if the declarant is unavailable as a witness." Fed. R. Evid. 804(b)(1).

Supervisory Special Agent Frederick C. Kingston will be granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVESTER J. SCHIEBER and VICKI A. SCHIEBER, as Co-Personal Representatives of the Estate of SHANNON SCHIEBER; SYLVESTER SCHIEBER; VICKI SCHIEBER	:	**CIVIL ACTION**
v.	:	
CITY OF PHILADELPHIA, STEVEN WOODS, individually and a Police Officer, and RAYMOND SCHERFF, individually and as a Police Officer.	:	**NO. 98-5648**

ORDER

AND NOW, this 13th day of December, 2000, for the reasons stated in the foregoing memorandum, it is **ORDERED:**

1. Defendants' in limine motion to preclude and/or limit the testimony of Dr. Gary L. French, is **GRANTED** in part and **DENIED** in part. Dr. French may testify with respect to Schieber's future career in academia and consulting, without reliance on personal interviews with Schieber friends. He may not testify with regard to Schieber's future career in the private sector.

2. Defendants' motion in limine to preclude and/or limit the testimony of Walter P. Connery is **DENIED** except to the extent that Connery may not testify to legal conclusions or to what Fourth Amendment standards are.

3. Defendants' motion in limine to preclude and/or limit the testimony of Larry McCann is **DENIED** except to the extent that he may not testify to legal conclusions.

4. Defendants' motion in limine to preclude admission of the redacted FBI Profile Report and all testimony of Supervisory Special Agent Frederick C. Kingston is **GRANTED**.

S.J.